No. 85-77

In The

Supreme Court of the United States

October Term, 1985

JOHN RASKIEWICZ,

Petitioner,

vs.

THE TOWN OF NEW BOSTON: MANCHESTER REDIMIX CONCRETE, INC.; *et al,*

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR RESPONDENT, PATRICIA L. (GETMAN) ANDREWS

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STATEMENT OF THE CASE

This action arose from an application made by the petitioner, John Raskiewicz, for a gravel permit from the Town of New Boston in 1974. Pursuant to State Statutes (NH RSA 31:60 and 31:41-b) the Town had, in 1972, passed an ordinance requiring a permit prior to the removal of earth products in the Town.

In 1964, the petitioner, John Raskiewicz, purchased the parcel of land, and in 1974 he applied to the Board of Selectmen with

the intent of procuring a permit under that Town Ordinance. After two public hearings were held on the petitioner's application for a permit, the Board denied his permit request on June 13, 1974. Thereafter, on August 12, 1974, the petitioner filed a petition for declaratory judgment in Hillsborough County Superior Court [Raskiewicz v. Strong, et al., No. E-1329 (A1256)].[1] In that petition, the petitioner challenged the constitutionality of the Town Ordinance; claimed that the denial by the Board of his permit request constituted a "taking of property for which just compensation was required;" and that the decision of the Board was "unreasonable and unlawful, arbitrary and capricious and contrary to the facts as stated." On October 26, 1974, the respondent, Patricia L. (Getman) Andrews, along with twenty-seven (27) other concerned residents of New Boston filed a motion to intervene in the declaratory judgment action in which they alleged *inter alia* that:

> John Raskiewicz's proposed operation of his gravel pit would be in violation of the Town Ordinance to Regulate Removal of Earth Products in that (a) the excavation necessitated by such operation will be detrimental to the welfare of the Town in terms of property values, historic or scenic character, and environmental quality, (b) such operation will endanger the public health and safety and constitute a nuisance through production of noise, dust, and other by-products seriously objectionable and detrimental to the normal use of adjacent property, (c) the earth removal necessitated by such operation will result in traffic

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1. All references to record below refer to appendix before Court of Appeals and are cited herein as "A" followed by a page number. Citations to petition of John Raskiewicz to this Court and appendices thereto are cited as "PA" followed by a page number.

> congestion and hazards and will result in undue injury to ways over which material is transported, and (d) when the operation is completed, John Raskiewicz will not establish the site so as to prevent erosion and the site will be detrimental to the welfare of the Town in terms of property values, historic or scenic character, and environmental quality (A1265).

Fifteen of those individuals moving to intervene alleged that they were "residents of New Boston who live nearby the Raskiewicz gravel operation," (A1267) and that "the proposed operation of John Raskiewicz's gravel pit would cause special damages . . . including depreciation in their property resulting, *inter alia* from the traffic flow occasioned by the Raskiewicz operation" (A1267). The other individuals moving to intervene stated that they were ". . . residents of New Boston who (were) concerned about the overall effect on the Town of New Boston of large-scale gravel operations" (A1267). All of the individuals moving to intervene alleged that ". . . the proposed operation of John Raskiewicz's gravel pit would cause special damages to the Town of New Boston, in that it would be detrimental to the health, safety, and welfare of the Town of New Boston and its residents . . . and would cause depreciation in the value of the property of the residents of the Town of New Boston" (A1267).

On May 8, 1975, the court, by order of Chief Justice Keller, granted the motions to intervene of nineteen (19) of those individuals requesting intervenor status (A1272, A1273). *The motion was denied with regard to the respondent, Patricia (Getman) Andrews, and eight others who requested intervenor status by motion of October 26, 1974. As of the date of the court order of May 8, 1975, Patricia (Getman) Andrews' involvement with this controversy ended.*

In June, 1983, however, Patricia (Getman) Andrews was named as one of the defendants in an 85-page complaint (A8) in which, despite the failure of Patricia L. (Getman) Andrews to successfully acquire intervenor status, it was alleged that she, during the period 1974 through 1980, illegally conspired to deny John Raskiewicz a permit and included nineteen counts alleging a wide variety of statutory, common law, and constitutional causes of action. On July 29, 1983, an answer was filed on behalf of Patricia L. (Getman) Andrews (A203). On August 3, 1983, a motion to dismiss on the statute of limitations was filed by Patricia L. (Getman) Andrews (A224). On August 19, 1983, her answer was amended to state the affirmative defense of the statute of limitations pursuant to the Federal Rules of Civil Procedure (A258). On September 14, 1983, the respondent filed a motion to join in the motion to dismiss by Herbert Elliot, Jr., Barbara Stewart, and Kathryn Kacharos, pursuant to Federal Rule of Civil Procedure 12(b)(6), on the basis that she ". . . was not an intervenor as described by the plaintiff and (had) no involvement in the discovery proceedings or any other role in the litigation" (A436). This motion (of September 14, 1983) was granted by court order of September 30, 1983.

On December 8, 1983, a motion to dismiss was filed by Patricia L. (Getman) Andrews (A554), in which she argued that the petitioner, in a response received by respondent's counsel on September 12, 1983, to motion of defendants, Herbert G. Elliot, Barbara Stewart, and Kathryn Kacharos, to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), had said that he was agreeable to dismissing all actions against those intervenors who did not file affidavits to intervene and who were not listed as intervenors by the ruling of the Hillsborough County Superior Court, and that since she had not been granted intervenor status, the action against her should be dismissed (A780). Attached to the motion of December 8, 1983, was an affidavit of Patricia L. (Getman) Andrews in which she attested to the fact that she

was never granted intervenor status in the case of *John Raskiewicz v. Harold Strong, et al.* (A557).

On December 16, 1983, a hearing was held in which eight (8) motions to dismiss, four (4) motions for summary judgment, and eleven (11) other motions then pending before the court were considered (A693). By order dated January 13, 1984 (A621) the court found the petitioner's ". . . federal claims to be totally frivolous and unwarranted" (A647), and stated that ". . . the plaintiff's action was an abuse of process and an abuse of each of the many defendants" (A648). Consequently, the court granted summary judgment in favor of each and every defendant (A648). In addition, the court ordered the petitioner and his counsel to equally recompense all of the defendants for their expenses and reasonable attorney's fees (A650).

On February 8, 1984, the petitioner filed a notice of appeal to the First Circuit Court of Appeals, which affirmed the district court's grant of summary judgment on behalf of the respondents on February 7, 1985. While the petitioner states that his appeal "did not include federal claims against the townspeople (intervenors), only New Hampshire state law claims which Raskiewicz contends the district court should have heard as pendent claims" (PA5, footnote 2), the petitioner continued to assert that there was sufficient evidence on the record to support claims against Patricia L. (Getman) Andrews arguing that his allegations of bias and conspiracy against Andrews were tied to those against the Town and Redimix and involved the same set of operative facts.

In its affirmance, the First Circuit found the district court to be completely justified in its conclusion "that Raskiewicz's federal claims were totally frivolous and unwarranted" (PA17a). The court also held that the appeal itself was of a frivolous nature and ordered that the petitioner be taxed with double costs (PA17a).

REASONS FOR DENYING THE WRIT

I.

The petition for writ of certiorari should be denied because the petitioner continues to demonstrate his bad faith, by misrepresenting the facts in his petition to this Court.

In his petition for writ of certiorari to this Court, the petitioner has demonstrated his continued bad faith by misrepresenting his case against "intervenors" who were named as parties in this action in the United States District Court for the District of New Hampshire as being against ". . . several of the individual townspeople who had been granted 'intervenor' status in the state proceeding" (PA5). Such is clearly not the case with respect to Patricia (Getman) Andrews who was denied intervenor status in the superior court action (A1271, A1273). While the petitioner did not list Ms. Andrews in his petition under the "Parties to the Proceeding" (PAiii), pursuant to Supreme Court Rule 19.6, all parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties to petition for writ of certiorari. The failure of the petitioner to fully and accurately described the individual townspeople, including the respondent, Patricia L. (Getman) Andrews, only highlights the justification of the district court for imposing sanctions against the petitioner.

This Court has held that federal courts have broad statutory and inherent power to assess attorneys fees in an action ". . . when the losing party has acted in bad faith, vexatiously, wantonly, or for aggressive reasons. . ." *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 260, 44 L. Ed. 2d 141, 154, 95 S. Ct. 1612 (1975), quoting *F. D. Rich Co. v. Industrial Lumber Co.,* 417 U.S. 116, 129, 40 L. Ed. 2d 703, 714, 94 S. Ct. 2157 (1974), *citing Vaughn v. Atkenson,* 369 U.S. 527, 8 L. Ed. 2d 88, 82 S. Ct. 997 (1962). Here the district court had ample justification to

support an award of attorney fees in favor of the respondent in light of the patently irresponsible action of the petitioner in bringing action against her for merely attempting to assert her ". . . constitutional right to engage in the rough and tumble of the democratic process" (A28). While she was unsuccessful in her attempt to become a party to the Superior Court action, she was nonetheless caused to suffer the burden of defending against a ninety million ($90,000,000) dollar lawsuit in which she was the victim of such groundless and unsubstantiated charges as intentional infliction of emotional distress (A53), fraud (A54), negligent infliction of emotional distress (A54), inverse condemnation of petitioner's real property (A55), interference with advantageous business relationship/advantage (A57), conspiracy to violate the Sherman Act (A59), violation of the Clayton Act (A63) and six counts of violation of the RICO Act (A67-A93). While other unsubstantiated allegations were made against the respondent, Patricia (Getman) Andrews, these demonstrate the gross recklessness of the petitioner's action.

While the attorney for the petitioner on December 5, 1983, did agree to drop his action against the respondent that agreement was contingent upon his being given a frank, off-the-record discussion with her by which the petitioner's attorney hoped to find out what ". . . the townspeople were really doing in the case" (A781). The attorney for the petitioner during the lunch break during the hearing of December 16, 1983, continued to apply the condition to any release of Patricia L. (Getman) Andrews, and when questioned by the court concerning this, the attorney for the petitioner declined to deny his actions stating that "[P]erhaps Mrs. Getman Andrews is more involved than her attorney realizes" (A784). Such an extortionistic practice by the petitioner's attorney is only another example of the clear justification that the district court had for granting attorney fees in favor of the petitioner. The respondent, who was forced to incur thousands of dollars in legal fees in the district court proceedings (A681-A692) continues to be forced to incur substantial amounts in responding here.

II.

The petition for writ of certiorari should be denied because the decision of the United States Court of Appeals for the First Circuit is fully in conformance with decisions of this Court and does not involve substantial or unresolved federal questions.

The major basis set forth by the petitioner for the writ of certiorari to this Court appears to be that the district court violated the petitioner's due process and First Amendment rights by entering sanctions against him and his counsel pursuant to the entry of summary judgment in favor of the respondents.

Not only did the district court act within the appropriate scope of discretion in awarding attorney fees under the inherent power of the court to do so where the losing party is found to have acted in bad faith, but such action was also appropriate under 42 U.S.C. § 1983 inasmuch as this was a situation where the ". . . plaintiff's action was frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421, 54 L. Ed. 2d 648, 657, 98 S. Ct. 694, 701 (1978). Even without a finding of the subjective bad faith element, the Supreme Court has held that attorney fees can be awarded in appropriate circumstances in groundless and meritless action such as this. *Id.* The holding of this Court in *Christiansburg Garment Co., supra,* was more recently affirmed in *Hughes v. Rowe,* 449 U.S. 5, 14-15, 101 S. Ct. 173, 178-179, 60 L. Ed. 2d 163, 173 (1980).

CONCLUSION

No basis exists under Supreme Court Rule 17 for this Court to issue a writ of certiorari in this case. Not only was the district court's exercise of discretion in sanctioning the petitioner and his counsel for their bad faith in the underlying action fully in line with decisions of this Court, but the petitioner even now continues to demonstrate that same bad faith in his petition to this Court. For these reasons, the respondent, Patricia L. (Getman) Andrews, requests that this Court deny the petition for writ of certiorari.

Respectfully submitted

/s/ _____

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